Supreme Court, U.S.
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No. __-____

IN THE
Supreme Court of the United States

WILLIAM SEABOLD, WARDEN,
Petitioner

versus

DEAN VINCENT,
Respondent

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER THE COURT OF APPEALS' UNEXPLAINED DECISION IN LILLY V. VIRGINIA, 527 U.S. 116 (1999), RETROACTIVELY ON HABEAS REVIEW OF THIS CASE WHICH BECAME FINAL FOUR YEARS EARLIER IN 1995 VIOLATES 28 U.S.C. SECTION 2254(d), AND WILLIAMS V. TAYLOR, 529 U.S. 362 (2000)?

II. DOES WILLIAMS V. UNITED STATES, 512 U.S. 594 (1994) AUTHORIZE FEDERAL HABEAS COURTS TO REQUIRE RETROACTIVE APPLICATION OF THE FEDERAL RULES OF EVIDENCE IN STATE COURT TRIALS?

PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS UNDER REVIEW

The parties to the proceeding in the Court whose judgment is under review are: (1) the Commonwealth of Kentucky; and (2) Dean Vincent.

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DECISION") AND (2) 28 U.S.C. §2254(d)(1) IN GRANTING FEDERAL HABEAS CORPUS RELIEF TO VINCENT BASED ON LILLY V. VIRGINIA, 527 U.S. 116 (1999), WHICH WAS DECIDED APPROXIMATELY FOUR YEARS AFTER VINCENT'S CASE BECAME FINAL ON DIRECT REVIEW IN THE KENTUCKY COURTS. 9

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PETITION FOR WRIT OF CERTIORARI

Comes the Commonwealth of Kentucky, by counsel, and submits this brief on petition for a writ of certiorari.

OPINION BELOW

The petitioner seeks certiorari review of the published Sixth Circuit panel decision in Vincent v. Seabold, 226 F.3d 681 (6th Cir. 2000), rehearing and suggestion for rehearing *en banc* denied December 12, 2000.

The procedural history leading to the United States Sixth Circuit Court of Appeals Opinion is as follows. Vincent's convictions for murder and related offenses were affirmed by the Kentucky Supreme Court in Kinser v. Commonwealth, Ky., 741 S.W.2d 648 (1987). In Vincent v. Parke, 942 F.2d 989 (6th Cir. 1991), two members of the three judge panel deciding Vincent's appeal determined that federal habeas corpus relief should be granted and that Vincent should be afforded a new trial. After retrial in the Kentucky courts, pursuant to which Vincent was again found guilty, the Kentucky Supreme Court affirmed in an unpublished opinion in Johnson v. Commonwealth, No. 93-SC-168-MR, Slip Opinion (Ky. S.Ct. June 8, 1995). The United States Magistrate Judge recommended dismissal of Vincent's subsequent federal habeas corpus petition in Findings of Fact, Conclusions of Law and Recommendation

entered on August 5, 1998 in Civil Action No. 1:97CV-91-M in the United States District Court for the Western District of Kentucky at Bowling Green. In an order entered on September 29, 1998 in Civil Action No. 1:97CV-91-M in the United States District Court for the Western District of Kentucky at Bowling Green, the United States District Court adopted the Magistrate's Findings of Fact and Conclusions of Law and dismissed Vincent's federal habeas corpus petition.

JURISDICTION

The petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254. The petitioner seeks certiorari review of a United States Court of Appeals Opinion decided September 13, 2000, granting federal habeas corpus relief to an inmate in state custody.

Rehearing and suggestion for rehearing *en banc* were denied by the Sixth Circuit on December 12, 2000. This petition is, therefore, timely pursuant to United States Supreme Court Rule 13.

CONSTITUTIONAL PROVISION INVOLVED

The case involves the scope of the Confrontation Clause embodied in the Fifth Amendment to the United

States Constitution, as defined by federal law clearly established by the United States Supreme Court when Vincent's case became final on direct review in the Kentucky Courts in 1995.

STATEMENT OF THE CASE

In 1987, Vincent's convictions on charges of first degree burglary, first degree robbery, and wanton murder were affirmed by the Kentucky Supreme Court in Kinser v. Commonwealth, Ky., 741 S.W.2d 648 (1987). The opinion affirmed his respective sentences of twenty years, twenty years, and life. The convictions and sentences resulted from a jury trial in state court.

In Vincent v. Parke, 942 F.2d 989 (6th Cir. 1991), two members of the three judge panel deciding Vincent's previous appeal from the denial of federal habeas corpus relief determined that Vincent should be afforded a new trial. The reversal was based on the following:

> Detective Gaddie, referring to his earlier conversation with Kinser's sister, Eva Kinser, regarding her brother's participation in the charged crimes, confirmed that Eva Kinser had informed him that "Leroy [Kinser] told [her] that he was with Ronnie and Dean during the

> crime but he stood in the doorway and was too shocked to move because of what Ronnie [Johnson] and Dean [Vincent] were doing to Hayes[.]"

During the original trial, Ms. Eva Kinser had denied making the foregoing statement attributed to her by Detective Gaddie. Kinser v. Commonwealth, Ky., 741 S.W.2d 648, 652 (1987). The two justices voting to reverse in Vincent v. Parke admitted that "the independent evidence introduced at trial against Vincent was substantial". Id., at 992. Nevertheless, those justices felt that they could not "conclude beyond a reasonable doubt that the probable impact of Kinser's statement to his sister was harmless". Id., at 993.

The dissenting opinion also employed a harmless error analysis. Id., 993-996. The dissenting opinion concluded in relevant part as follows:

> Because the prosecution presented overwhelming evidence of Vincent's participation in the crimes, any error regarding the admission of Kinser's two out-of-court statements was certainly harmless as the district court properly concluded. Id., at 996.

In Stoner v. Sowders, 997 F.2d 209 (6th Cir. 1993), the Court recognized that a less stringent harmless error analysis would be employed were Vincent v. Parke, supra, to be decided subsequent to the United States Supreme Court's opinion in Brecht v. Abrahamson, 507 U.S. 619 (1993). Moreover, 18 U.S.C. Section 2254 (d) was amended in 1996 to provide for a more deferential standard of review for constitutional error in state court proceedings than previously had been embodied in that statute.

In Vincent's retrial, the Commonwealth did not introduce the statement Ms. Eva Kinser denied making to Detective Gaddie concerning what Leroy Kinser was asserted to have said to her about Vincent. In Vincent's retrial in state court, Detective Gaddie did testify from a redacted transcript of Leroy Kinser's taped statement to Detective Gaddie. (TE X 1468-1480; APX 185-197).

Kinser was a co-defendant at Vincent's original trial. At the conclusion of the guilt phase evidence against Kinser, Vincent, and another co-defendant, Ronald Johnson, the jury retired to deliberate the fate of Vincent and Johnson. After the jury returned with the verdicts and sentences against

Vincent and Johnson, the jury then heard testimony concerning Kinser's taped statement, and retired to deliberate his fate. Kinser v. Commonwealth, supra, at 650 - 651.

Kinser refused to testify at Vincent's retrial. After relevant records searches, appointment of counsel for Kinser, and a hearing, Kinser was found to have no Fifth Amendment rights. He thereafter was without dispute declared to be unavailable as a witness. (TE II 256-287; APX 262-278).

Kinser's statement was extensively edited for presentation at Vincent's retrial. (TE X 1462, 1467-1480; APX 185-197; TE X prior 1985 trial, 52-79; APX 206-237).

Kinser's complete, unredacted statement - as well as questioning of Detective Gaddie thereon - is part of the record of the original trial. (TE X prior 1985 trial, 49-86; APX 207-244). In his statement, Kinser admitted to his participation in the robbery and the burglary. He manifested no reluctance to see Hayes killed. In that statement, Kinser admits his participation in the robbery and the burglary from start to finish. He admits he knew Vincent was armed with a billy club. (TE X prior 1985 trial 59-60; APX 208-209). He admits to entering the Hayes home and "looking around to

see if I could find anything". (TE X prior 1985 trial 72; APX 230). He admits he received $40 from the robbery. (TE X 70 prior 1985 trial 75; APX 233). Indeed, when Det. Gaddie premises a question by stating "After you all robbed Harold Hayes and killed him and you went on up to Judy Seabolt's", Kinser makes no attempt whatsoever to distance himself from the murder. (TE X prior 1985 trial 76-77; APX 234-235).

In an unpublished opinion rendered on June 8, 1995, the Kentucky Supreme Court affirmed Vincent's convictions and sentences on retrial. [Johnson v. Commonwealth, No. 93-SC-168-MR, Slip Op. (Ky. Sup. Ct. June 8, 1995); APX 70, 153]. The jury in Vincent's second trial found him guilty of first degree burglary, first degree robbery, and wanton murder. (TR III 378-385; APX 305). Vincent was sentenced to respective sentences of fifteen years, fifteen years, and life. (TR III 419-421; APX 97).

The Kentucky Supreme Court did, however, remand the case to the Butler Circuit Court to run Vincent's fifteen year sentences concurrently with his life sentence, rather than consecutively. On remand, the Butler Circuit Court amended its Judgment accordingly.

Vincent thereafter sought federal habeas relief, which was denied. In an Opinion recommended for full-text publication a panel of the United States Sixth Circuit Court of Appeals reverses and remands. Rehearing and suggestion for rehearing *en banc* were denied on December 12, 2000.

REASONS FOR GRANTING THE WRIT

I. THE PANEL DECISION IN VINCENT V. SEABOLD, 226 F.3D 681 (6TH CIR. 2000) CONFLICTS WITH (1) WILLIAMS V. TAYLOR, 120 S.Ct. 1495 (2000) (CLEARLY ESTABLISHED FEDERAL LAW, AS DETERMINED BY THE SUPREME COURT OF THE UNITED STATES "REFERS TO THE HOLDINGS, AS OPPOSED TO THE DICTA, OF THIS COURT'S DECISIONS AS OF THE TIME OF THE RELEVANT STATE-COURT DECISION") AND (2) 28 U.S.C. §2254(d)(1) IN GRANTING FEDERAL HABEAS CORPUS RELIEF TO A PETITIONER BASED ON THE PLURALITY OPINION IN LILLY V. VIRGINIA, 527 U.S. 116 (1999), WHICH WAS DECIDED APPROXIMATELY FOUR YEARS AFTER VINCENT'S CASE BECAME FINAL ON DIRECT REVIEW IN THE KENTUCKY COURTS.

The theoretical underpinning of the panel decision in Vincent v. Seabold is the panel's application of two United States Supreme Court decisions: Williamson v. United States, 512 U.S. 594 (1994) and Lilly v. Virginia, 527 U.S. 116 (1999). (Vincent v. Seabold, Slip Opinion at pp. 8-13).

The panel decision in Vincent v. Seabold violates the directive in Williams v. Taylor, 120 S.Ct. 1495 (2000) that the reference in 28 U.S.C. §2254(d) to clearly established federal law, as determined by the Supreme Court of the United States, refers "to the holdings, as opposed to dicta, of this Court's decisions as of the time of the relevant state-court decision." Id., 120 S.Ct. at 1523 (Justice O'Connor delivering the opinion as to Part II) (Emphasis added). The relevant state court decision in Vincent's case is the Kentucky Supreme Court Opinion on direct appeal, which was rendered on June 8, 1995. (Apx. 70, 153). Despite this, and despite recognizing that subsequent United States Sixth Circuit Court of Appeals Opinions in Gilliam v. Mitchell, 179 F.3d 990, 994 (6th Cir. 1999) and Neuman v. Rivers, 125 F.3d 315, 319-320 (6th Cir. 1997) "held that the hearsay exception for statements against penal interest constitutes a firmly rooted exception for purposes of Confrontation Clause analysis", the panel decision in Vincent v. Seabold applies a plurality opinion, Lilly v. Virginia, 527 U.S. 116 (1999), which was rendered four years after the Kentucky Supreme Court Opinion on direct review in Vincent's case.

Noting that in Lilly, the "Supreme Court recently ended a circuit split by holding that accomplices' confessions that inculpate a criminal defendant are *not* within a firmly rooted hearsay exception to the hearsay rule as that concept

has been defined in our Confrontation Clause jurisprudence," the panel decision proceeds to apply the Lilly decision to Vincent's case. (Vincent v. Seabold, Slip Opinion, pp. 10-12). This directly contravenes the directive in Williams v. Taylor that clearly established federal law, as determined by the Supreme Court of the United States, "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." (Id., 120 S.Ct. at 1523) (Emphasis added).

Moreover, Lilly was before the United States Supreme Court on a grant of certiorari review. It was not a federal habeas corpus proceeding; therefore, 28 U.S.C. §2254(d) had no application in the Lilly case.

II. THE PUBLISHED PANEL DECISION IN VINCENT V. SEABOLD, 226 F.3D 681 (6TH CIR. 2000) MISAPPLIES WILLIAMSON V. UNITED STATES, 512 U.S. 594 (1994) IN MANDATING COMPLIANCE WITH AN INTERPRETATION OF A FEDERAL RULE OF EVIDENCE IN CONTRAVENTION OF ESTELLE V. MCGUIRE, 502 U.S. 62 (1991) AND FED. RULE EVID. 101.

The theoretical underpinning of the panel decision in Vincent v. Seabold is the panel's application of two United States Supreme Court decisions: Williamson v. United States, 512 U.S. 594 (1994) and Lilly v. Virginia, 527 U.S. 116 (1999). (Vincent v. Seabold, Slip Opinion at pp. 8-13).

The specific issue addressed in Williamson v. United States, 114 S.Ct. 2431 (1994) was "the scope of the hearsay exception for statements against penal interest. Fed. Rule Evid. 804(b)(3)." (Id., 114 S.Ct. at 2433). Williamson v. United States is clearly established federal law pursuant to 28 U.S.C. §2254(d) and Williams v. Taylor, supra, only with respect to the interpretation of Federal Rule of Evidence 804(b)(3). The Federal Rules of Evidence apply to the federal courts. Fed. Rule Evid. 101. The state courts are not required to adhere to the Federal Rules of Evidence. Indeed, the United States Supreme Court has repeatedly held that a federal habeas corpus court may not overrule a state supreme court's interpretation of a matter of state law. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

The Kentucky Supreme Court applied Kentucky Rule of Evidence (KRE) 804(b)(3) to Vincent's case. [Johnson v. Commonwealth, No. 93-SC-168-MR, Slip Opinion (Ky. Sup. Ct. June 8, 1995); Apx. 80-81].

Williamson v. United States may be clearly established federal law with respect to the interpretation of Federal Rule of Evidence 804(b)(3), but it is irrelevant to federal habeas corpus review of Dean Vincent's case because Federal Rule of Evidence 804(b)(3) is not binding on the state courts. The published panel decision in Vincent v. Seabold nevertheless

erroneously concludes that the adjudication of Vincent's claim in the Kentucky courts:

> . . . was "contrary to" the clearly established federal law set forth in Williamson in that the trial court, faced with facts materially indistinguishable from those in Williamson, reached a conclusion opposite to that reached by Williamson; we think it also was an "unreasonable application" of the governing legal standard established in Williamson. (Slip Opinion, at pp. 12-13).

The Sixth Circuit panel reached this conclusion despite the fact that Williamson v. United States, supra, was not a Confrontation Clause case. The holding in the Williamson case was premised on an interpretation of the Federal Rules of Evidence, and did not apply the Federal Rules of Evidence to state court proceedings.

CONCLUSION

WHEREFORE, certiorari review should be granted.

Respectfully submitted,

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No. __-____

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WILLIAM SEABOLD, WARDEN,
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APPENDIX TO CERTIORARI PETITION

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

ELECTRONIC CITATION: 2000 FED App. 0317P (6th Cir.)
File Name: 00a0317p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEAN VINCENT,
Petitioner-Appellant,

v.

WILLIAM SEABOLD, Warden,
Respondent-Appellee.

No. 98-6457

Appeal from the United States District Court
for the Western District of Kentucky at Bowling Green.
No. 97-00091—Joseph H. McKinley, Jr., District Judge.

Argued: August 10, 2000

Decided and Filed: September 13, 2000

Before: KEITH, COLE, and GILMAN, Circuit Judges.

COUNSEL

ARGUED: Oleh R. Tustaniwsky, DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellant. Kent T. Young, OFFICE OF THE ATTORNEY GENERAL, CRIMINAL APPELLATE DIVISION, Frankfort, Kentucky, for Appellee. **ON BRIEF:** Oleh R. Tustaniwsky, DEPARTMENT OF PUBLIC ADVOCACY, Frankfort, Kentucky, for Appellant. Kent T. Young, OFFICE OF THE

ATTORNEY GENERAL, CRIMINAL APPELLATE DIVISION, Frankfort, Kentucky, for Appellee.

OPINION

R. GUY COLE, JR., Circuit Judge. In August 1985, a jury in Butler County, Kentucky, convicted Petitioner-Appellant Dean Vincent, along with co-defendants Leroy Kinser and Ronald Johnson, of first degree robbery, first degree burglary, and murder. It was established at trial that on June 15, 1983, the defendants broke into the home of Harold Hayes, beat him, bound him with duct tape, and robbed the home, leaving Hayes to die of blunt-force injuries to the head. All three defendants were sentenced to twenty years' imprisonment on both the robbery and the burglary convictions and life imprisonment on the murder convictions. After the Kentucky Supreme Court affirmed their convictions on direct appeal in *Kinser v. Commonwealth*, 741 S.W.2d 684 (Ky. 1987), Vincent and Johnson filed petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2254. The district court denied each petition, but this Court reversed, concluding that Vincent and Johnson were entitled to habeas relief on the ground that their Sixth Amendment rights to confrontation had been violated. *See Vincent v. Parke*, 942 F.2d 989, 993 (6th Cir. 1991); *Johnson v. Parks*, 955 F.2d 44, 1992 WL 27027 (6th Cir. Feb. 14, 1992). We remanded the case for retrial, and on February 14, 1993, a jury found Vincent and Johnson guilty of first degree robbery, first degree burglary, and wanton murder. Vincent was sentenced to fifteen years' imprisonment on both the robbery and burglary convictions and life imprisonment on the murder conviction; the sentences were to run consecutively. The Kentucky Supreme Court affirmed Vincent's convictions but remanded the case to the Butler Circuit Court for resentencing because Kentucky law requires that the fifteen year sentences were to run concurrently with the life sentence. On April 22, 1997, Vincent filed a second petition for writ of habeas corpus, asserting, inter alia, that various testimony violated his Sixth Amendment rights under

the Confrontation Clause. Upon recommendation of the magistrate judge, the district court denied Vincent's habeas petition. This appeal follows.

For the reasons that follow, we **REVERSE** the district court's judgment and **REMAND** to the district court with instructions to grant the petition for habeas corpus unless, within a reasonable time, the Commonwealth elects to afford Vincent a new trial.

DISCUSSION

I. Standard of Review

We review a district court's legal conclusions in a habeas proceeding de novo and its factual findings for clear error. *See Lucas v. O'Dea*, 179 F.3d 412, 416 (6th Cir. 1999). Because Vincent filed his habeas petition on April 22, 1997, review of the state court's decision is governed by the standards set forth in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Lindh v. Murphy*, 521 U.S. 320, 336 (1997); *Harpster v. Ohio*, 128 F.3d 322, 326 (6th Cir. 1997). As amended, 28 U.S.C. § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court unless the adjudication of the claim--
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), the Supreme Court recently explained that an

"unreasonable application" of clearly established federal law established by Supreme Court precedent occurs if "the state court identifies the correct governing legal rule from [the Supreme Court's] cases but unreasonably applies it to the facts of the particular state prisoner's case." *See id.* at 1520. A state court decision can be "contrary to" clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at an opposite result. *See Machacek v. Hofbauer*, 213 F.3d 947, 952-53 (6th Cir. May 26, 2000) (citing *Williams*, 120 S. Ct. at 1519).

II. Confrontation Clause

A.

Vincent first asserts that the trial court violated his Sixth Amendment right to confrontation when it allowed Detective Gaddie of the Kentucky State Police to testify as to post-arrest, custodial hearsay statements made by former co-defendant Kinser.[1] Prior to the retrial, Vincent filed a motion to exclude Kinser's confession as violative of the Confrontation Clause, but the trial court denied Vincent's motion, holding that the confession would be admissible in the event that Kinser refused to testify. The trial court relied upon *Taylor v. Commonwealth*, 821 S.W.2d 72 (Ky. 1991) (holding that a co-defendant's confession was admissible under exception to hearsay rule for statement against penal interest by unavailable declarant, notwithstanding the fact that the confession implicated the defendant, because the co-defendant admitted to having been an active participant in the crime), *cert. denied*, 502 U.S. 1100 (1992), *overruled on other grounds, St. Clair v. Roark*, 10 S.W.3d 482 (Ky. 1999)).

Before Kinser was called to the stand, the court conducted an in-chambers conference with all counsel present to

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[1]Kinser, who was convicted along with Vincent and Johnson in the first trial, was not on retrial.

determine if Kinser would testify voluntarily. As Kinser had been tried and convicted and his sentence had been affirmed, it was determined that Kinser possessed no Fifth Amendment right that would allow him to refuse to testify. The court decided that it would allow the Commonwealth to call Kinser to the stand. Once on the stand, Kinser refused to take the oath and would not testify, despite the fact that the court advised him he possessed no Fifth Amendment right against self-incrimination and that he would be held in contempt. The court recessed for the day, and the next morning appointed counsel for Kinser, confirming once again that according to the federal court clerk and the Kentucky Supreme Court clerk, Kinser could invoke no right under the Fifth Amendment that would enable him to refuse to testify. After Kinser again refused to testify, the court ordered him in contempt and held him to be an "unavailable witness" under Ky. R. Evid. 804(a) (recognizing the unavailability of a witness in situation where declarant "persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so").

Thereafter, the Commonwealth announced its intention to call Detective Gaddie to the stand to testify as to the post-arrest, custodial statements made by Kinser. Before allowing Gaddie to introduce Kinser's confession, the court held another in-chambers conference to discuss Gaddie's intended testimony concerning the substance of Kinser's confession and the taking of his statements. Gaddie explained that Kinser had signed a properly executed *Miranda* rights form and that Kinser's attorney, Gary Logsdon, had advised him to give a statement. The court also reviewed the transcript from a 1984 suppression hearing in which Logsdon testified that he and Kinser had discussed at length Kinser's option of making a statement. Logsdon testified that Kinser "sincerely desired to make a statement," understood his *Miranda* rights, was not under duress or compulsion, and understood that no inducements or promises had been made by the police or prosecutor. Defense counsel argued that Kinser's confession was not a statement against penal interest under hearsay exception Ky. R. Evid. 804(b)(3) because it sought to

inculpate Vincent and Johnson while minimizing Kinser's own participation in the crime. However, the court determined that Kinser's confession was sufficiently self-inculpatory insofar as he indicated that he was an active and willing participant in the crime and made no effort to prevent or diminish the severity of the blows Vincent and Johnson gave to Hayes. The court then allowed Gaddie to testify as to Kinser's confession, stating, "the presumption of unreliability has been overcome by the evidence that we've heard and . . . the confession, to the extent that it is relevant to the matters charged, is admissible as evidence."

Detective Gaddie then testified that on August 29, 1983, Kinser made a statement to Gaddie at the State Police Post in Bowling Green, Kentucky. Kinser told Gaddie the following: He, Vincent, and Johnson broke into the home of Harold Hayes, finding Hayes asleep on the couch. Vincent approached Hayes and struck him twice in the head with a billy club and began to search the house for money. Johnson kicked Hayes and then began to use duct tape to constrain him. Vincent returned to the room and began interrogating Hayes about the whereabouts of some money that defendants believed was in the house. Vincent again struck Hayes with the club three or four more times before continuing his search. All the while, Kinser was searching the house for the money. Vincent then yelled to the others that "he'd found it" and returned to the room with a sack of money. Johnson then taped shut Hayes's eyes and mouth, and the three defendants left the house.[2] Vincent asserts that Gaddie's testimony violated his Sixth Amendment right to confrontation. The Sixth Amendment provides that in "all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him." *Idaho v. Wright*, 497 U.S. 805, 813 (1990) (citing U.S. Const. amend. VI). In *Idaho v. Wright*, the Supreme Court recognized:

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[2]It was established at trial that although Hayes died of blunt force injuries to the head, he would have died of suffocation resulting from his broken nose and the swelling of his mouth and tongue caused by the duct tape.

> From the earliest days of our Confrontation Clause jurisprudence, we have consistently held that the Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause.
>
> . . . .
>
> [S]tatements admitted under a "firmly rooted" hearsay exception are so trustworthy that adversarial testing would add little to their reliability.

Idaho v. Wright, 497 U.S. at 813, 821 (internal citations omitted). The Court held that if the hearsay statement falls within a firmly rooted exception, it does not run afoul of the Confrontation Clause. *Id.* Those statements that do not fall within a traditional exception, but fall within the residual, or catch-all, hearsay exception, also may be admitted without implicating the Confrontation Clause if the proponent shows that "particularized guarantees of trustworthiness" make the statements so trustworthy that cross-examination of the hearsay declarant would add little to the reliability of the statements. *Id. See also Ohio v. Roberts*, 448 U.S. 56, 65-66 (1980) (holding that hearsay statements do not violate the Confrontation Clause when the prosecution shows that the declarant is unavailable and that the statement bears adequate "indicia of reliability") (citing *Barber v. Page*, 390 U.S. 719 (1968) (holding that the government must show the unavailability of a witness before it may introduce less reliable accounts of witness's statements at trial)).

Rule 804 of the Federal Rule of Evidence[3] sets forth certain exceptions to the hearsay rule that apply when the declarant is an unavailable witness. Rule 804 states that, "[u]navailability as a witness includes situations in which the declarant . . . persists in refusing to testify concerning the

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[3]Rule 804 of the Kentucky Rules of Evidence mirrors the language of the Fed. R. Evid. 804.

subject matter of the declarant's statement despite an order of the court to do so . . . ." FED. R. EVID. 804(a)(2). The Rule provides that if the declarant is in fact unavailable as a witness, statements against interest are not excluded by the hearsay rule. FED. R. EVID. 804(b). A "statement against interest" is defined as follows:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

FED. R. EVID. 804(b)(3). Here, neither party challenges the trial court's determination that Kinser was in fact an unavailable witness under Rule 804. Vincent argues, however, that Gaddie's testimony does not fall within the hearsay exception because Kinser's confession was not "a statement against interest" in that Kinser essentially sought to distance himself from the murder.

In *Williamson v. United States*, 512 U.S. 594 (1994), the Supreme Court defined the scope of Rule 804(b)(3) when the declarant's statements both subject the declarant to criminal liability and inculpate the defendant. In *Williamson*, the prosecution sought to admit hearsay statements made by the declarant, who had been arrested after police found large amounts of cocaine in the car he was driving and who made custodial statements to a DEA agent that indicated that the cocaine belonged to the defendant. *See id.* at 596-97. *Williamson* first considered the question of what is meant by a "statement" in light of the principle that "Rule 804(b)(3) is founded on the commonsense notion that reasonable people, even reasonable people who are not especially honest, tend

not to make self-inculpatory statements unless they believe them to be true." *Id.* at 599. Reasoning that this principle mandates a narrow definition of "statement" as "a single declaration or remark," rather than a broad definition as "a report or narrative," the Court held:

> In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Id. at 599, 600-01; *see also United States v. Jinadu*, 98 F.3d 239, 246 (6th Cir. 1996) (holding that a court must evaluate the admissibility of each declaration or remark within the confession when determining whether those statements are admissible under the hearsay exception for statements against penal interest); *United States v. Canan*, 48 F.3d 954 (6th Cir. 1995) ("[W]hen ruling upon a narrative's admissibility under [Rule 804(b)(3)], a court must break it down and determine the separate admissibility of each single declaration or remark.") (internal quotation marks and citation omitted). *Williamson* went on to explain:

> There are many circumstances in which Rule 804(b)(3) does allow the admission of statements that inculpate a criminal defendant. Even the confessions of arrested accomplices may be admissible *if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.*

Id. at 603 (emphasis added). Thus, the proper Rule 804(b)(3) analysis under *Williamson* requires examining the circumstances in which the statements are made in order to determine whether they are self-inculpatory or self-serving. The proper inquiry is "whether the statement was sufficiently against the declarant's penal interest 'that a reasonable person

in the declarant's position would not have made the statement unless believing it to be true,' and this question can only be answered in light of all the surrounding circumstances." *Id.* at 603-04 (quoting FED. R. EVID. 804(b)(3)) (footnote omitted).

Because the declarant in *Williamson* implicated the defendant while in police custody and after already having confessed to the crime, the Court concluded that naming the defendant did little to implicate the declarant any further and was probably an effort to secure a lesser punishment through cooperation. *See id.* at 604 (opinion of O'Connor, J., in which Scalia, J. joined); *id.* at 607-08 (opinion of Ginsburg, J., in which Blackmun, Stevens, and Souter, J.J., joined). *See also United States v. Boyce*, 849 F.2d 833, 836 (3d Cir. 1988) (holding that a statement given in custody was not reliable because circumstances indicated that it may have been "motivated by a desire to curry favor"). However, because the lower court failed to conduct the appropriate analysis, breaking down each remark sentence by sentence, *Williamson* remanded the case without reaching the issue of whether the Confrontation Clause rendered the statements inadmissible, expressly declining to determine whether the hearsay exception for statements against interest is "firmly rooted" for Confrontation Clause purposes. *See id.* at 605.

Although the Sixth Circuit has held that the hearsay exception for statements against penal interest constitutes a firmly rooted exception for purposes of Confrontation Clause analysis, *see Gilliam v. Mitchell*, 179 F.3d 990, 994 (6th Cir. 1999); *Neuman v. Rivers*, 125 F.3d 315, 319-320 (6th Cir. 1997), the Supreme Court recently ended a circuit split by holding that "accomplices' confessions that inculpate a criminal defendant are *not* within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." *Lilly v. Virginia*, 527 U.S. 116, 134 (1999) (emphasis added). *Lilly* noted that, "[t]his, of course, does not mean . . . that the Confrontation Clause imposes a blanket ban on the government's use of nontestifying accomplice statements that incriminate a

defendant. Rather, it simply means that the Government must satisfy the second prong of the *Ohio v. Roberts*, 448 U.S. 56 (1980), test in order to introduce such statements." *Id.* (internal quotation marks and alterations omitted). *Lilly* also recognized:

> Nothing in our prior opinions, however, suggests that appellate courts should defer to lower courts' determinations regarding whether a hearsay statement has particularized guarantees of trustworthiness. To the contrary, those opinions indicate that we have assumed, as with other fact-intensive, mixed questions of constitutional law, that independent review is necessary to maintain control of, and to clarify, the legal principles governing the factual circumstances necessary to satisfy the protections of the Bill of Rights.
>
> . . . .
>
> The Commonwealth correctly notes that the presumption of unreliability that attaches to codefendants' confessions may be rebutted. We have held, in fact, that any inherent unreliability that accompanies co-conspirator statements made during the course and in furtherance of the conspiracy is per se rebutted by the circumstances giving rise to the long history of admitting such statements. Nonetheless, the historical underpinnings of the Confrontation Clause and the sweep of our prior confrontation cases offer one cogent reminder: It is highly unlikely that the presumptive unreliability that attaches to accomplices' confessions that shift or spread blame can be effectively rebutted when the statements are given under conditions that implicate the core concerns of the old ex parte affidavit practice--that is, when the government is involved in the statements' production, and when the statements describe past events and have not been subjected to adversarial testing.

Id. at 136-37 (internal quotation marks, citations, and alterations omitted).

Thus, both *Williamson* and *Lilly* instruct that the statements made by Kinser are presumptively unreliable, and to rebut this presumption, we must evaluate the "indicia of reliability" associated with each individual remark or declaration made by Kinser. In so doing, we must bear in mind that it is highly unlikely that Kinser's post-arrest, custodial statements, which clearly shift the brunt of the blame to defendants Vincent and Johnson, effectively can be rebutted. *See id.*

Here, Gaddie's testimony reveals that while Kinser's overall confession was self-inculpatory insofar as it placed him at the scene of the crime as a participant, many of the statements were not individually self-inculpatory, as is required under *Williamson*, and in fact were wholly self-exculpatory, implicating both Vincent and Johnson. Kinser told Gaddie:

> [Vincent] hit [Hayes] with a billy club. . . . Ronnie Johnson was over there by Mr. Hayes. He had ah, kicked him . . . . [I] at the time, was back in the kitchen, around the table. [I] was lookin' around to–to see what [I] could find . . . . Deano [Vincent] came out of the back room and he hollered to Mr. Hayes, "where is it at" and Mr. Hayes said there wasn't any–"there's not any more" and Deano went over there and hit him three or four more time with that billy club. . . . Ronnie [Johnson] put the tape on Mr. Hayes, on his eyes and on his mouth.

The trial court held that Kinser's statements were self-inculpatory in that they show that Kinser was an active and willing participant in the crime and made no effort to prevent or diminish the severity of the blows Vincent and Johnson gave to Hayes. The magistrate judge and, in turn, the district court, agreed. We, however, disagree. All of these statements attempt to distance Kinser from the murder and minimize his participation in the crime; Kinser clearly was attempting to shift the blame away from himself and onto Vincent and Johnson. Finding otherwise was "contrary to" the clearly established federal law set forth in *Williamson* in that the trial court, faced with facts materially

indistinguishable from those in *Williamson*, reached a conclusion opposite to that reached by *Williamson*; we think it also was an "unreasonable application" of the governing legal standard established in *Williamson*. *See* 28 U.S.C. § 2254(d); *see also Williams*, 120 S. Ct. at 1519 (explaining that "contrary to" and "unreasonable application" do in fact have independent meanings). Despite the fact that the admission of Gaddie's testimony clearly violated Vincent's Sixth Amendment confrontation rights, we recognize that we may grant Vincent's habeas petition only if we determine that the error was not harmless. *See Wright*, 497 U.S. at 823-24; *Hill v. Brigano*, 199 F.3d 833, 846-47 (6th Cir. 1999). To make such a determination, we must decide that the trial court's error "had substantial and injurious effect or influence in determining the jury's verdict." *See Nevers*, 169 F.3d at 371 (holding that the *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), standard continues to apply on habeas review even after the amendments to AEDPA). Gaddie's testimony, alone, might not have had a "substantial and injurious effect" on the outcome of the case, given the other evidence against Vincent established at trial. However, as we discuss below in Part B, Gaddie's testimony was not the only improper testimony adduced at Vincent's trial.

B.

Vincent asserts that the trial court also violated his Sixth Amendment right to confrontation when it allowed Tammy Seabolt Shephard to testify that a year or two following the crime, Defendant Johnson told her that he had not murdered Hayes, but that it was Vincent and Kinser. Shephard was the eighteenth witness called in the Commonwealth's case in chief. Before Shephard testified, the trial court held an in-chambers conference to determine what the Commonwealth thought the substance of her testimony would be. The Commonwealth stated that based on Shephard's rebuttal statements made during the first trial, it anticipated that she would testify that "Johnson told her that they were all there and they killed Harold Hayes." The court then allowed Shephard to testify, and she stated that approximately one or

two years after the date of the crime, she had a conversation with Ronnie Johnson. Shephard testified, "Well, he was my sister's boyfriend, so I asked him did he kill Harold Hayes and he said no, I didn't kill him, Leroy [Kinser] and Dean [Vincent] did."

Following this statement, the trial court held another in-chambers conference, allowing defense counsel to put its objections on record and move for a mistrial on the ground that the testimony violated *Bruton v. United States*, 391 U.S. 123 (1968), which held:

> A defendant may be prejudiced by the admission in evidence against a co-defendant of a statement or confession made by that co-defendant. This prejudice cannot be dispelled by cross-examination if the co-defendant does not take the stand. Limiting instructions to the jury may not in fact erase the prejudice.

Id. at 132 (internal quotation marks and citation omitted).[4] The trial court overruled the motion and gave the jury a limiting instruction, finding that the error was not of a sufficient magnitude such that it had a likelihood of affecting the outcome of the trial. The trial court instructed:

> With regards to the testimony that the young lady gave just prior to lunch, that testimony was contrary to the Rules of Evidence. Ah, the question was proper, but the answer was given before the Court could stop her or anyone else could stop her, is in clear violation of our

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[4]Johnson did not testify at the retrial, though Vincent did. Incidentally, it was a *Bruton* violation during the first trial that resulted in the grant of Vincent's habeas petition and retrial, which is the subject of the present habeas action. *See Vincent v. Parke*, 942 F.2d 989 (6th Cir. 1991). In the first trial, Detective Gaddie testified that Kinser's sister, Eva Mae Kinser, told Gaddie that Kinser told her that Vincent committed the murder. This Court held that Gaddie's testimony, hearsay within hearsay, violated the Vincent's Sixth Amendment confrontation rights and warranted a new trial. *See id.* at 992.

> Rules of Evidence. It has no evidentiary value. It cannot be considered as evidence. It has no credibility and should be totally disregarded by you in every shape, form and fashion. It should be put out of your minds as if the statement was never made.

The Kentucky Supreme Court found that the trial court's admonition cured any defect.

The magistrate judge determined, and the district court agreed, that the admission of Shephard's testimony did not amount to reversible error, relying in part on its earlier determination that Gaddie's testimony regarding Kinser's statements properly was admitted, and thus, Shephard's improper statements had but a very slight effect on the jury. As we have determined, however, the admission of Gaddie's testimony was improper and violated Vincent's Confrontation Clause rights. Because Shephard's testimony also was improper under *Bruton*, we hold that the errors, taken together, "had [a] substantial and injurious effect or influence in determining the jury's verdict." *Brecht*, 507 U.S. at 638. We find that the introduction of Kinser's statements through Gaddie's testimony, together with Johnson's statement through Shephard's testimony, rendered the government's case against Vincent significantly more persuasive. We, therefore, conditionally GRANT Vincent's petition for writ of habeas corpus, subject to the Commonwealth retrying him within a reasonable period of time.

III. Severance and Speedy Trial

Vincent also argues on appeal that the trial court improperly denied his motion to sever his retrial from that of co-defendant Johnson's and that his Sixth Amendment right to a speedy trial was violated in that 16½ months elapsed from the time this Court ordered that Vincent be retried within a reasonable time in *Vincent v. Parke*, 942 F.2d 989 (6th Cir. 1991), until the start of Vincent's retrial. Neither of these assignments of error has any merit, and because we have granted Vincent's habeas petition on Confrontation Clause

grounds, we need not address his remaining arguments in any great detail.

With regard to his motion for severance, Vincent failed to demonstrate to the trial court "a strong showing of factually specific and compelling prejudice that [would] mislead or confuse the jury." *United States v. Cobleigh*, 75 F.3d 242, 248 (6th Cir. 1996) (quoting *United States v. Vinson*, 606 F.2d 149, 154 (6th Cir. 1979)) (internal quotation marks omitted). With regard to Vincent's claim that he was denied a speedy trial under the Sixth Amendment, none of the delay was caused by the government, there was no showing of bad faith or attempts by the government to seek a tactical advantage, and Vincent wholly failed to identify any specific way in which his defense was prejudiced as a result of the delay. *See Barker v. Wingo*, 407 U.S. 514 (1972). Accordingly, these assignments of error are without merit.

CONCLUSION

For the reasons set forth in Parts II.A and II.B above, we **REVERSE** the district court's denial of Vincent's petition for writ of habeas corpus and **REMAND** to the district court with instructions to grant the petition for habeas corpus unless, within a reasonable time, the Commonwealth elects to afford Vincent a new trial.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN
CIVIL ACTION NO. 1:97CV-91-M

DEAN VINCENT
PETITIONER

VS.

WILLIAM SEABOLD, Warden RESPONDENT

ORDER

The above matter having been referred to the United States Magistrate Judge who has filed his Findings of Fact, Conclusions of Law, and Recommendations, objections having been filed thereto, and the Court having considered the same, adopts the Findings of Fact and Conclusions of Law as set forth in the report submitted by the United States Magistrate Judge.

IT IS HEREBY ORDERED that respondent's motion for summary judgment is GRANTED and the petition for writ of habeas corpus is DISMISSED, with prejudice.

IT IS FURTHER ORDERED that petitioner's motion for leave to amend is DENIED.

This 28th day of September, 1998

/S/ Joseph H. McKinley, Jr.,
JOSEPH H. MCKINLEY, JR., JUDGE
UNITED STATES DISTRICT COURT

Copies to: Hon. Oleh R. Tustaniwsky
Hon. Kent T. Young
Magistrate Judge Goebel

ENTERED
9/29/98
JEFFREY A. APPERSON, CLERK
BY: LYNNE LYONS
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT BOWLING GREEN
CIVIL ACTION NO. 1:97CV-91-M

DEAN VINCENT PETITIONER

VS.

WILLIAM SEABOLD, Warden RESPONDENT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

BACKGROUND

The petitioner, by counsel, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 (DN 2). An order was entered on May 26, 1998 (DN 15) referring this matter to the undersigned United States Magistrate Judge for the disposition of all pretrial matters pursuant to 28 U.S.C. Section 636(b)(1)(A) and for the filing of proposed findings of fact, conclusions of law and recommendations for the disposition of all other matters pursuant to 28 U.S.C. Section 636(b)(1)(B). Respondent has filed a motion for summary judgment (DN 9) and petitioner filed a

response as well as, alternatively, a motion for leave to amend (DN 14). This matter is now ready for consideration by the undersigned.

FINDINGS OF FACT

Dean Vincent ("Vincent") and two co-defendants, Leroy Kinser ("Kinser") and Ronald Johnson ("Johnson"), were indicted by the Butler Circuit Court on August 12, 1983, for first degree burglary, first degree robbery, capitol {sic} murder, and criminal conspiracy relating to the burglary, robbery and death of Butler County resident, Harold Hayes. The defendants' trial began on August 12, 1985 and concluded on August 23, 1985. The jury found all three defendants guilty of first degree robbery, first degree burglary and murder. The defendants were sentenced to twenty years imprisonment on both the robbery and the burglary convictions and life imprisonment on the murder convictions. Their convictions were affirmed by the Kentucky Supreme Court on direct appeal. Kinser v. Commonwealth, 741 S.W.2d 684 (Ky. 1987).

Thereafter, Vincent and Johnson each filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The district court denied each petition. However, the United States Court of Appeals for the Sixth Circuit concluded that Vincent and Johnson were entitled to habeas relief on the ground that their Sixth Amendment right to confrontation was abridged. Vincent v. Parke, 942 F.2d 989, 993 (6th Cir. 1991); Johnson v. Parke, 1992 WL 27027 (6th Cir.). The Sixth Circuit Court of Appeals reversed and remanded the cases to the district court with instructions to take such action in the event the Commonwealth does not grant Vincent and Johnson a new trial within a reasonable time.

The retrial of Vincent and Johnson began on February 8, 1993. On February 14, 1993 the jury found both Vincent and Johnson guilty of wanton murder, first degree burglary and first degree robbery. The jury fixed Vincent's punishment at life imprisonment for murder, fifteen years imprisonment for first degree

burglary, fifteen years imprisonment for first degree robbery and recommended that the sentences run consecutively. On February 14, 1993 the trial court sentenced Vincent to life imprisonment and two fifteen year sentences to run consecutively with each other and with any other sentence. Vincent's convictions were affirmed but the Kentucky Supreme Court did remand the case to the Butler Circuit Court with instructions to resentence Vincent because Kentucky law directs that his fifteen year sentences run concurrently with his life sentence rather than consecutively.

CONCLUSIONS OF LAW

Since Vincent filed his petition for writ of habeas corpus on April 22, 1997 review of the state court's decisions is governed by the standards established by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L.No. 104-132, 110 Stat. 1214 (1996) ("AEDPA"). Lindh v. Murphy, ____ U.S. ____, 117 S.Ct. 2059 (1997). Chapter 153 of the AEDPA, amended Title 28 of the United States Code and altered the standard

of review that a federal court must employ when deciding whether to grant a writ of habeas corpus. As amended, 28 U.S.C. §2254(d) provides as follows:

> "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) Resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or
>
> (2) Resulted in a decision that was based on an unreasonable determination of facts in light of the evidence presented in the State court proceeding."

A.

Vincent contends that the trial court violated his Sixth Amendment right to confront an adverse witness when it allowed the admission of hearsay statements

by a non-testifying accomplice as substantive evidence against him.

Kinser was the first witness called by the Commonwealth during the retrial of Vincent and Johnson (TE 256). Kinser refused to take the oath and would not testify in spite of being advised by the Court that his refusal may constitute contempt (TE 264-265). During a conference in chambers, the trial court announced that it would appoint counsel for Kinser. Because of the late hour the court recessed the trial for the day.

The following morning, in chambers, appointed counsel for Kinser confirmed that there is no privilege that prevented Kinser from testifying (TE 272-273). The trial court announced for the record that the federal court clerk and the clerk of the Supreme Court of Kentucky confirmed that Kinser had no pending actions related to his criminal conviction (TE 273). The trial court then found that Kinser did not have Fifth Amendment rights to invoke with respect to testifying

during the pending criminal trial and ordered Kinser to submit to oath and testify (TE 273-274). When Kinser refused to testify the trial court found him to be in contempt and held him to be an unavailable witness under Ky.R.Evid. 804(a) (TE 274-278).

Following this ruling the Commonwealth announced its intent to introduce the statement of Kinser through Detective Gaddie. Counsel for both defendants tendered a motion to preclude the use of Kinser's statement on the grounds that it does not fall under the Ky.Evid.R. 804(b)(3) statement against interest exception to the hearsay rule (TR 344-345; TE 280-282). The court indicated that when the Commonwealth sought to introduce the confession it would conduct an in-camera hearing (TE 282).

The Commonwealth moved to introduce Kinser's confession during the testimony of its last witness, Detective Gaddie (TE 1402). In chambers, the court heard extensive oral argument and testimony by Detective Gaddie concerning the taking of Kinser's

statement (TE 1402-1453). The trial court also considered the transcript of the November 1984 suppression hearing concerning Kinser's confession[1] (TE 1454). The trial court concluded that after consulting with his attorney and in the presence of his attorney, Kinser gave his confession without any inducements, promises or coercion (TE 1454-1455). The trial court found that Kinser's confession indicated he was a willing and active participant in the joint criminal

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[1]During the November 5, 1984 suppression hearing attorney Gary Logsdon testified that he discussed the matter long enough with Kinser to be satisfied that he "sincerely desired to make a statement," he understood his Miranda rights, he was not under duress or compulsion, and he understood that no inducements or promises had been made by police or the prosecutor (TH 28-29). Detective Gaddie and the Commonwealth's Attorney confirmed that Kinser and attorney Logsdon conferred in private, at length, and that attorney Logsdon was present for most of the taping of the statement (TH 37-38, 49-50). Kinser testified that he had a severe alcohol problem and was drunk when he turned himself into the police on August 21, 1983 (TH 54). Kinser recalled briefly meeting with attorney Logsdon on August 29, 1983, and being instructed to "tell them some kind of story." (TH 56).

venture who made no effort to prevent or diminish the severity of the blows Vincent and Johnson gave to the victim during the course of their interrogation (TE 1456-1457). The court noted that Kinser actively searched the house while the interrogation occurred (TE 1456-1457). The trial court also found that every major element of Kinser's confession was supported by independent testimony presented during the trial (TE 1457-1458). As a result, the trial court found "that the presumption of unreliability has been overcome by the evidence that we've heard and that the confession, to the extent that it is relevant to the matters charged, is admissible as evidence." (TE 1458).

Detective Gaddie testified that on August 29, 1983 he spoke with Kinser at the State Police Post (TE 1458). Kinser told Detective Gaddie that when they broke into Hayes' home they found him asleep on the couch (TE 1475). As soon as they entered the house Vincent went over to the couch and hit Hayes twice with a billy club (TE 1475). Vincent then went into the

backroom to search (TE 1476). Johnson kicked Hayes and then began tearing pieces of tape and placing them by Hayes (TE 1476). Vincent returned to the main room and demanded Hayes tell them "where is it at" (TE 1476). Hayes denied there was any more money and Vincent struck Hayes "three or four more times with the billy club" (TE 1476). While this was occurring Kinser was in the kitchen searching (TE 1476-1477). Vincent again left the main room to search (TE 1476-1477). Vincent then hollered that he had found "it" and returned to the main room with a sack in his hand (TE 1477). Vincent cut the top off the sack and there was money inside (TE 1477). Before they left, Johnson taped up Hayes' eyes and mouth (TE 1477). On cross-examination defense counsel brought out the fact that Kinser's statement was not signed and sworn (TE 1483).

The Supreme Court of Kentucky acknowledged that generally a defendant's Sixth Amendment right to confrontation is violated when he is directly incriminated by the confession of a nontestifying co-

defendant (DN 9, exhibit A p.11). Here, however, the Supreme Court of Kentucky found no conflict with the Confrontation Clause because of the trial court's ruling that Kinser's statement was against his penal interest which is a recognized exception to the hearsay rule (DN 9, exhibit A pp. 10-12). (citing Ky.R.Evid. 804(b)(3); Harrison v. Commonwealth, 858 S.W.2d 172 (Ky. 1993) and Taylor v. Commonwealth, 821 S.W.2d 72 (Ky. 1990)). The Supreme Court of Kentucky agreed with the trial court's determination that the presumption of unreliability had been rebutted (DN 9, exhibit A p. 12).

The Confrontation Clause of the Sixth Amendment provides "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." Read literally the language would require the exclusion of any statement made by an unavailable declarant. See Mattox v. United States, 156 U.S. 237, 243 (1895). However, such a reading "would abrogate virtually every hearsay exception, a result long rejected as unintended and too

extreme." Ohio v. Roberts, 448 U.S. 56, 63 (1980). The historical evidence and underlying policies indicate that the Confrontation Clause is intended to exclude some hearsay. Roberts, 448 U.S. at 63.

"The Confrontation Clause operates in two separate ways to restrict the range of admissible hearsay." Roberts, 448 U.S. at 65. First, the prosecution must either produce or demonstrate the unavailability of the declarant. Roberts, 488 (sic) U.S. at 65 (citing Mancusi v. Stubbs, 408 U.S. 204 (1972); Barber v. Page, 390 U.S. 719 (1968)). Next, the hearsay statement is admissible only if it bears adequate "indicia of reliability." Roberts, 488 (sic) U.S. at 65-66. "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Roberts, 488 (sic) U.S. at 66. Alternatively,

there must be "a showing of particularized guarantees of trustworthiness." Roberts, 488 (sic) U.S. at 66.[2]

Vincent does not object to the trial court's finding that Kinser was unavailable. Rather, Vincent takes exception with the trial court's finding that the confession was against Kinser's penal interest. Vincent argues that the statements about Vincent and Johnson beating and taping up Hayes[3] are not actually against Kinser's penal interest because he sought to distance himself from the murder. See Williamson v. United

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[2]Although the parties have referred to Bruton v. United States, 391 U.S. 123 (1968) in their arguments, this is not strictly speaking a Bruton case because the court is not addressing the effectiveness of limiting instructions in preventing spill-over to a defendant when his co-defendant's confession is admitted against the co-defendant in a joint trial.

[3]Prosecution expert witness Barbara Weakley Jones testified that Mr. Hayes died as a result of blunt force injuries to the head (TE 747). Had the blows to the head not killed Mr. Hayes then he would have suffocated due to significant swelling the duct tape caused to his tongue plus the broken nose (TE 748).

States, 512 U.S. 594, 603-604 (1994); United States v. Jinadu, 98 F.3d 239, 246 (6th Cir. 1996); Ernest v. Dorsey, 87 F.3d 1123, 1133-1134 (10th Cir. 1996); Taylor v. Commonwealth, 821 S.W.2d 72, 78 (Ky. 1990) (Liebson, J., dissenting). Alternatively, Vincent argues even if the statements are against Kinser's penal interest that is not sufficient "indicia of reliability" to overcome the presumption of unreliability because a declaration against penal interest is not a firmly rooted exception to the hearsay rule, Lee v. Illinois, 476 U.S. 530, 544 n. 5 (1986), United States v. Flores, 985 F.2d 770, 775 (5th Cir. 1993), and because the statements are not supported by "particularized guarantees of trustworthiness." Idaho v. Wright, 497 U.S. 805, 819 (1990); United States v. Gomez-Lemos, 939 F.2d 326, 331-333 (6th Cir. 1991); Myatt v. Hannigan, 910 F.2d 680, 684 (10th Cir. 1990).

Although Kinser's confession is a statement against penal interest the Supreme Court has held that in this context that hearsay exception "defines too large a class for meaningful Confrontation Clause analysis."

Lee, 476 U.S. at 544 n.5; Earnest (sic), 87 F.3d at 1131; Flores, 985 F.2d at 775. The Supreme Court has, however, indicate (sic) the following:

> There are many circumstances in which Rule 804(b)(3) does allow the admission of statements that inculpate a criminal defendant. Even the confessions of arrested accomplices may be admissible if they are truly self-inculpatory, rather than merely attempts to shift blame or curry favor.

Williamson, 512 U.S. at 603. Therefore, Kinser's confession is "presumptively unreliable," Lee, 476 U.S. at 541, and is admissible against Vincent only if "particularized guarantees of trustworthiness" are demonstrated. Lee, 476 U.S. at 543. In conducting this analysis corroborating evidence may not be considered as an indicium of reliability for Kinser's statements. Wright, 497 U.S. at 823; Earnest (sic), 87 F.3d at 1132.

Williamson and its progeny Iinadu and Ernest merely direct that the court must determine the admissibility of each declaration or remark within the confession when ruling upon its admissibility under

the statement against penal interest exception. Fed.R.Evid. 804(b)(3); Williamson, 512 U.S. at 600-604; Jinadu, 98 F.3d at 246; Ernest, 87 F.3d at 1133-1134. Determining whether a statement is self-inculpatory or not can only be accomplished by viewing it in context. Williamson, 512 U.S. at 604. The Court pointed out that even statements "that are on their fact neutral may actually be against the declarant's interest." Williamson, 512 U.S. at 604. For example, "'I hid the gun in Joe's apartment' may not be a confession of a crime; but if it is likely to help the police find the murder weapon, then it is certainly self-inculpatory." Williamson, 512 U.S. at 604. Other statements "that give police significant details about the crime may also, depending on the situation be against the declarant's interest." Williamson, 512 U.S. at 604. Notably, Williamson was rendered subsequent to Vincent's retrial. However, the trial court noted that Justice Leibson's dissent in Taylor v. Commonwealth, 821 S.W.2d 72, 77-82 (Ky. 19900, called for a more fact-

intensive inquiry (TE 1456). As a result, the trial court analyzed each of Kinser's statements in context to determine whether it was self-inculpatory (TE 1456-1457).

The trial court also found that the evidence presented during the prosecution's case in chief corroborated the statements in Kinser's confession. This analysis is contrary to the Supreme Court holding in Wright, 497 U.S. at 823.

Even without consideration of the trial evidence corroborating Kinser's confession, however, the undersigned finds reliable the portions of Kinser's statements related to the jury during the retrial, as it bears other important indicia of reliability. First, the statements were strongly against Kinser's penal interest. In fact, the trial court commented that there is a "natural inclination to believe that when a man confesses and inculpates himself in any crime wherein he's charged with Murder, Robbery and Burglary, that that's contrary to penal interest" (TE 1456). Though not

dispositive of reliability this is certainly a factor that merits consideration. See Ernest, 87 F.3d at 1133. As previously mentioned, the trial court did not assume that Kinser's entire confession was reliable merely because some elements of it were self-inculpatory. The trial court went on to note that although Kinser's statements indicated he did not strike Hayes, his statements do indicate he was a willing and active participant in the crimes who made no effort to prevent or diminish the severity of the blows struck by his accomplices during the interrogation (TE 1457). The trial court concluded that "under the circumstances, any reasonable person would have to believe that confessing to an active involvement of a crime of this sort or the planning stage completely through the execution, without manifest reluctance, was in fact contrary to his penal interest" (TE 1457). The trial court also reviewed transcripts of the 1984 suppression hearing and concluded that Kinser gave his confession without any inducements, promises or coercion after

consulting with an attorney (TE 1455). In summary, the presumption of unreliability concerning the portions of Kinser's confession actually related to the jury was overcome by a showing of particularized guarantees of trustworthiness. Therefore, admission of the hearsay evidence did not violate Vincent's rights under the Confrontation Clause.

B.

Vincent contends that the trial court violated his Sixth Amendment right to confront an adverse witness when it allowed Tammy Seabolt Shephard to testify that a year or two after the crime co-defendant Johnson told her it was Vincent and Kinser, not him, who killed Hayes. According to Vincent the trial court's admonition to the jury to disregard the testimony did not cure the error. Vincent argues that the trial court's error is very similar to an error that occurred during the first trial which resulted in the Sixth Circuit concluding that Vincent and Johnson were entitled to habeas relief on the ground that their Sixth

Amendment right to confrontation was abridged. See, Vincent v. Parke, 942 F.2d 989, 993 (6th Cir. 1991). Vincent asserts that since the evidence against him during the retrial was "circumstantial--aside from the erroneous admission of Kinser's confession"--the trial court's error was not harmless beyond a reasonable doubt.

Tammy Seabolt Shephard ("Shephard") is the eighteenth witness called by the prosecution in the retrial. During direct examination Ms. Shephard confirmed that she had a conversation with defendant Johnson subsequent to the Hayes murder (TE 978-979). At that point the trial court conducted an in chambers conference during which the Commonwealth advised that Ms. Shephard's anticipated response would be that Johnson "told her that they were all there and they killed Harold Hayes." (TE 979). However, when Ms. Shephard was questioned before the jury she testified that a year or two after the crime occurred she asked Johnson whether he killed Harold Hayes and he replied

"no, I didn't kill him, Leroy and Dean did." TE 985). The trial court conducted another conference in chambers (TE 986). After hearing oral argument the trial court concluded that the confrontation clause error that occurred during the first trial was entirely different from the situation that had just unfolded. (TE 1012). Because the witness took the stand and was available for cross-examination the trial court believed that the admission by Johnson was admissible with respect to Johnson and possibly with respect to Vincent but found that the admission of the testimony was in error (TE 1012-1013). The trial court also indicated that considering the evidence that has been heard and the evidence that the Commonwealth indicates that it intends to present the statement by Ms. Shepherd, standing alone with admonishment, would have little likelihood of affecting the outcome of the trial (TE 1013). For that reason the trial court overruled the motion for mistrial (TE 1013). Thereafter the trial court admonished the jury that although the question was

proper Ms. Shephard gave an answer that was contrary to the rules of evidence before the Court could stop her (TE 1017-1018). The Court explained that her testimony had no evidentiary value and explained to the jury that it could not consider her testimony as evidence (TE 1018). The trial court further stated "it has no credibility and should be totally disregarded by you in every shape, form, and fashion." (TE 1018). The Court also instructed as follows:

> "You are to put it out of your mind, as though it has never been said. Do we all understand each other? OK."

(TE 1018).

The Supreme Court of Kentucky concluded that the trial court's admonition was more than sufficient to cure any error that occurred (DN 9, exhibit a, p. 13). The Supreme Court of Kentucky also concluded that given the evidence against Vincent any error that may have occurred was harmless (DN 9, exhibit a, p. 13).

The circumstances here are distinguishable from those that occurred during the first trial. Here, Ms.

Shephard's testimony was merely cumulative because the Kinser statement placed Vincent at Hayes' store on the night of the murder and indicated that Vincent struck Hayes with a billy club. Further, the evidence presented during the retrial was not entirely circumstantial as it had been during the first trial. See, Vincent, 942 F.2d at 993. Perhaps the most important distinction is the change in the harmless error standard. In 1991 the standard was harmless beyond a reasonable doubt. Vincent, 942 F.2d 992 (citations omitted.) However that standard changed in 1993. See, Brecht v. Abrahamson, 507 U.S. 619 (1993). Under the new standard, an error may be deemed harmless if the reviewing court find that the error did not influence the jury, or had but very slight effect and the judgment was not substantially swayed by the error. Kotteakos v. United States, 328 U.S. 750, 764-765 (1946). In light of the properly admitted statements of Kinser, the undersigned concludes that Ms. Shephard's testimony though volative of Vincent's confrontation clause

rights, did not influence the jury or had but a very slight effect on the jury.

C.

Next, Vincent contends that the trial court violated his Sixth Amendment rights when it denied his motion for a separate trial because the trial was replete with testimony that was admissible against Johnson but not against Vincent.

In chambers before jury voir dire counsel for Vincent moved to sever because he was convinced that there was going to be some testimony that would be admissible as to Johnson but not as to Vincent (TE 38-46). After hearing oral argument the trial court concluded that since both defendants were being charged and tried for the same event or series of events and the evidence the Commonwealth intended to present was expected to be equally incriminating as to both defendants. The Court concluded that there was not a sufficient basis to sever (TE 46). The Supreme Court of Kentucky concluded that counsel for Vincent

and Johnson had failed to demonstrate to the trial judge the necessity for a separate trial because all they offered was the assertion that the defendant's defenses "might become antagonistic depending upon the tenor of the trial as it progressed." (DN 9, exhibit a, p. 14). Because Vincent and Johnson failed to demonstrate that prejudice occurred and that the likelihood of such prejudice was clearly demonstrated to the trial judge the Supreme Court of Kentucky concluded that the trial court did not abuse its discretion in overruling the defense motion to sever (DN 9, exhibit a, p. 14).

As a general matter severance cases focus either on antagonistic defense claims, See, e.g., Jenkins v. Bordenkircher, 611 F.2d 162 (6th Cir. 1979), cert. denied, 446 U.S. 943 (1980), or on asserted need for co-defendant testimony, See, e.g., Tifford v. Wainwright, 588 F.2d 954 (5th Cir. 1979). Vincent alleges that the trial court should have granted his motion for severance because of antagonistic defense claims. Vincent argues that the transcript of Johnny Lee

Sowders' testimony from the first trial, testimony by Danny Cornwell, testimony by Louise Wilson and testimony by Lisa Hodge Wertz which was incriminating as to Johnson was very prejudicial to him because it allowed the jury to convict him based upon his association with Johnson rather than evidence actually tying him to the crimes charged. Vincent also asserts that since Johnson did not testify during the retrial he was denied his right to confront him in violation of Bruton.

The mere existence of antagonistic defenses does not mandate severance. Jenkins, 611 F.2d at 167-168. In order to prevail Vincent must demonstrate both an abuse of discretion and prejudice from denial of a severance motion. Jenkins, 611 F.2d at 168 (citation omitted). There is a strong policy in favor of joint trials when the charges will be proved by the same series of acts and Vincent has failed to demonstrate that the existence of antagonistic defenses confused the jury. See, United States v. Horton, 847 F.2d 313, 317 (6th Cir.

1988). Most of the testimony that Vincent complains about did not implicate him in the crime. Secondly, Vincent had an opportunity to cross-examine each of the witnesses. As a result the undersigned concludes that Vincent has failed to demonstrate that the trial court abused its discretion in denying the motion to sever. In light of the overwhelming evidence of Vincent's guilt the undersigned concludes that Vincent was not prejudiced as a result of the denial of the severance motion. Furthermore, under these circumstances, any error resulting from denial of the motion for severance was harmless. Brecht v. Abrahamson, 507 U.S. 619 (1993).

D.

Next, Vincent contends that he was denied his right to a speedy trial in violation of the Sixth Amendment because approximately seventeen months passed between the time the Sixth Circuit ordered that he be retried within a reasonable time and the start of his retrial. Vincent blames the Department of Public

Advocacy, an agency of the Commonwealth, for a nearly fifteen month delay in appointing counsel after he was granted a new trial.

The record reflects that the delay in retrying Vincent was primarily due to the difficulty of appointing counsel for both defendants. The Department of Public Advocacy was appointed to represent Johnson and Vincent on January 10, 1992 and a retrial was scheduled to begin on August 11, 1992. However, that trial date had to be continued because defense counsel was not available. In fact counsel for Johnson and Vincent did not make an appearance until November 18, 1992. However a trial date was scheduled for November 23, 1992. In spite of objections by Vincent, his appointed counsel moved the Court for an order continuing the trial date because there was not sufficient time to adequately prepare for the trial.

The trial court on November 24, 1992 addressed the issue and concluded that the delay was not due to bad faith on the part of the Commonwealth and that

the delay would not be prejudicial to the defendants. The Supreme Court of Kentucky, applying Barker v. Wingo, 407 U.S. 514 (1972), concluded that the four pronged test had not been satisfied because there was no allegation that the delay was due to bad faith on the part of the prosecution and there was no showing of prejudice because all evidence from the previous trial was preserved (DN 9, exhibit a, pp. 15-17).

In addressing this type of claim consideration should be given to the length of delay, the reasons for the delay, the defendant's assertion of his right and prejudice to the defendant. Doggett v. United States, 505 E.S. (sic) 647, 651 (1992); Barker v. Wingo, 407 E.S. (sic) 514, 530 (1972). Vincent blames the delay on the Commonwealth. Vincent claims the Commonwealth's allocation of resources to the Department of Public Advocacy prevented it from expeditiously providing him with counsel. However, there is no evidence in the record to support this assertion. Additionally, Vincent apparently made no effort to advise the trial court that

the Department of Public Advocacy was dilatory in assigning him trial counsel. Rather, Vincent merely waited quietly and then sought dismissal of the charges because of the delay. Further, Vincent has not demonstrated that his defense was impaired by the delay. To the contrary, the decision of his trial counsel to delay the November 23, 1992 trial date inured to Vincent's benefit because defense counsel was better prepared to represent Vincent during the retrial. After reviewing the relevant facts and applicable law, the undersigned concludes that Vincent has failed to demonstrate that the state court decision was contrary to, or involved in unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States or that it was based on an unreasonable determination of facts in light of the evidence presented in the state court proceeding.

RECOMMENDATION

For the foregoing reasons, it is recommended that respondent's motion for summary judgment be

granted and that the petition for writ of habeas corpus be dismissed with prejudice. Since the petition for writ of habeas corpus (DN 2) and petitioner's response to the motion for summary judgment (DN 14) adequately present petitioner's arguments there is no basis for granting leave to amend the petition.

This 4th day of August, 1998.

/S/ Robert Goebel
E. ROBERT GOEBEL
UNITED STATES MAGISTRATE JUDGE

NOTICE

Therefore, under the provisions of 28 U.S.C. Sections 636(b)(1)(B) and (C) and Fed.R.Civ.P. 72(b), the Magistrate Judge files these findings and recommendations with the Court and a copy shall forthwith be mailed to all parties. Within ten (10) days after being served with a copy, any party may serve and file written objections to such findings and recommendations as provided by the Court. If a party

has objections, such objections must be filed within ten (10) days or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir.), aff'd, 474 U.S. 140 (1984). Counsel will please forward a copy of any objections to the undersigned Magistrate Judge at Room 126, United States Courthouse, 423 Frederica Street, Owensboro, Kentucky 42301.

/S/ Robert Goebel
E. ROBERT GOEBEL
UNITED STATES MAGISTRATE JUDGE

DATE: August 5, 1998

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No. 98-6457

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEAN VINCENT	)	
	)	
Petitioner - Appellant,	)	
	)	
v.	)	ORDER
	)	
WILLIAM SEABOLD, Warden,	)	
	)	
Respondent - Appellee	)	
	)	

BEFORE: KEITH, COLE, and GILMAN, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original

submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
LEONARD GREEN, CLERK

FILED
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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
No. 98-6457

DEAN VINCENT
Petitioner - Appellant,

v.

WILLIAM SEABOLD, Warden
Respondent - Appellee

Before: KEITH, COLE, and GILMAN,
Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Western District of Kentucky
at Bowling Green

THIS CAUSE was heard on the record from the district court and was argued by counsel

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court denying petitioner Dean Vincent's petition for writ of habeas corpus is REVERSED, and the case is

REMANDED for further proceedings in accordance with the opinion of this court..

ENTERED BY ORDER OF THE COURT

/S/ Leonard Green
LEONARD GREEN, CLERK

FILED
SEP 13, 2000
LEONARD GREEN, CLERK